

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 12 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE RICARDO YANEZ,

Petitioner-Appellant,

v.

SECRETARY OF CORRECTIONS,

Respondent-Appellee.

No. 18-55116

D.C. No. 2:16-cv-09653-PSG-KES
Central District of California,
Los Angeles

ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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JOSE RICARDO YANEZ,
Petitioner,

11 v.

12 SECRETARY OF CORRECTIONS,
13 Respondent.

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16 “Unless a circuit justice or judge issues a certificate of appealability
17 “[COA”], an appeal may not be taken to the court of appeals from ... the final order
18 in a habeas corpus proceeding in which the detention complained of arises out of
19 process issued by a State court[.]” 28 U.S.C. § 2253(c)(1)(A). Rule 11 of the
20 Rules Governing Section 2254 Cases in the United States District Courts provides
21 in relevant part:

22

23 (a) **Certificate of Appealability.** The district court must issue or
24 deny a certificate of appealability when it enters a final order adverse
25 to the applicant. Before entering the final order, the court may direct
26 the parties to submit arguments on whether a certificate should issue.

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1 If the court issues a certificate, the court must state the specific issue
2 or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).
3 If the court denies a certificate, the parties may not appeal the denial
4 but may seek a certificate from the court of appeals under Federal
5 Rule of Appellate Procedure 22. A motion to reconsider a denial does
6 not extend the time to appeal.

7 (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a)
8 governs the time to appeal an order entered under these rules. A
9 timely notice of appeal must be filed even if the district court issues a
10 certificate of appealability.

11 Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

12 A COA may issue “only if the applicant has made a substantial showing of
13 the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel,
14 529 U.S. 473 (2000), the United States Supreme Court held that, to obtain a COA
15 under § 2253(c), a habeas petitioner must show that “reasonable jurists could debate
16 whether (or for that matter, agree that) the petition should have been resolved in a
17 different manner or that the issues presented were adequate to deserve
18 encouragement to proceed further.” Id. at 483-84 (citation omitted). “The COA
19 inquiry … is not coextensive with a merits analysis.” Buck v. Davis, 137 S. Ct.
20 759, 773 (2017). “[A] claim can be debatable even though every jurist of reason
21 might agree, after the COA has been granted and the case has received full
22 consideration, that petitioner will not prevail.” Miller-El v. Cockrell, 537 U.S. 322,
23 338 (2003); see also Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) (“The
24 standard for granting a certificate of appealability is low.”).

25 “Determining whether a COA should issue where the petition was dismissed
26 on procedural grounds has two components, one directed at the underlying
27 constitutional claims and one directed at the district court’s procedural holding.”
28 Slack, 529 U.S. at 485. Because both are required, “a court may find that it can

1 dispose of the application [for a COA] in a fair and prompt manner if it proceeds
2 first to resolve the issue whose answer is more apparent from the record and
3 arguments.” Id. at 485. The general rule that courts should not pass upon a
4 constitutional question if another dispositive ground is present “allows and
5 encourages the court to first resolve procedural issues.” Id. (citing Ashwander v.
6 TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

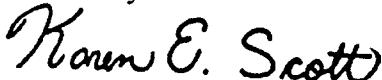
7 In the present case, the Court finds that Petitioner has not made the foregoing
8 showing with respect to any of the grounds for relief alleged in the Petition. As
9 discussed in the Report and Recommendation issued on September 29, 2017, the
10 Petition is untimely and Petitioner cannot rely on the alternative trigger date in
11 § 2244(d)(1)(D) because a letter brief he filed in the California Court of Appeal
12 shows that he was aware of the basic facts supporting his ineffective assistance of
13 counsel claims before the statute of limitations expired. (See Dkt. 34.)
14 Accordingly, a COA is denied in this case.

15
16 DATED: 12/19/17



17
18 PHILIP S. GUTIERREZ
19 UNITED STATES DISTRICT JUDGE

20 Presented by:



21 KAREN E. SCOTT
22 United States Magistrate Judge

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APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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JOSE RICARDO YANEZ,
Petitioner,

11 v.

12 SECRETARY OF CORRECTIONS,
13 Respondent.

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Case No. 2:16-cv-09653-PSG-KES

16 ORDER ACCEPTING REPORT AND
17 RECOMMENDATION OF UNITED
18 STATES MAGISTRATE JUDGE

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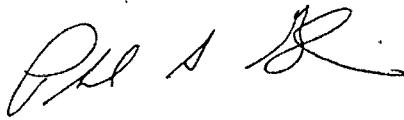
20 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other
21 records on file herein, and the Report and Recommendation of the United States
22 Magistrate Judge. Further, the Court has engaged in a de novo review of those
23 portions of the Report and Recommendation to which objections have been made.
24 The Court accepts the findings and recommendations of the Magistrate Judge.

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26 IT IS THEREFORE ORDERED that Judgment be entered denying the
27 Petition and dismissing this action with prejudice.

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DATED: 12/19/17



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ,

Petitioner,

v.

SECRETARY OF CORRECTIONS,

Respondent.

Case No. 2:16-cv-09653-PSG-KES

JUDGMENT

Pursuant to the Court's Order Adopting the Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: 12/19/17


PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE RICARDO YANEZ.

Petitioner.

10

SECRETARY OF CORRECTIONS,
(CDCR),

Respondent.

Case No. CV-16-09653-PSG (KES)

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

Jose Ricardo Yanez (“Petitioner”), a prisoner in state custody, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. 1 at 1-8 [“Petition”]; Dkt. 1 at 13-61 [“Addendum to Pet.”].)¹ Respondent moved to dismiss the Petition

¹ All further page citations to the Petition and the Addendum to the Petition

1 as untimely. (Dkt. 21.) Petitioner filed an opposition to the motion. (Dkt. 32.) For
2 the reasons set forth below, it is recommended that the motion be granted and that
3 the Petition be dismissed as untimely.

4 **II.**

5 **PROCEDURAL HISTORY**

6 On June 9, 2014, a jury in the Los Angeles County Superior Court found
7 Petitioner guilty of lewd or lascivious acts with a child under 14, aggravated sexual
8 assault of a child, attempted sodomy by force, and oral copulation with a child. (Dkt.
9 22-1 [Lodged Document or “LD” 1] at 21-22.) The evidence presented at trial
10 showed the following:

11 On four occasions between 2004 and 2007, [Petitioner] sexually
12 molested H.L., his live-in girlfriend’s daughter, beginning when she
13 was eight years old. H.L. reported the abuse in 2013, shortly after her
14 18th birthday. When she accused [Petitioner] of the abuse during
15 pretextual telephone calls recorded by police, he repeatedly apologized,
16 said he had to account to god for his actions, and wished he could take
17 it all back. When she asked him why he had molested her, he said he
18 felt like she had cared for him.

19 People v. Yanez, No. B259266, 2015 Cal. App. Unpub. LEXIS 5800, at *1 (Cal.
20 App. Aug. 14, 2015). On September 24, 2014, Petitioner was sentenced to a prison
21 term of 15 years to life for the aggravated sexual assault, plus 6 consecutive years on
22 the other counts. (Dkt. 22-1 [LD 1] at 24-28.) See also Yanez, 2015 Cal. App.
23 Unpub. LEXIS 5800, at *2.

24 Petitioner filed an appeal in the California Court of Appeal. His counsel filed
25 a brief pursuant to People v. Wende, 25 Cal. 3d 436 (1979) and Anders v. California,

27 are to the pagination utilized by Petitioner. All other page citations in this Order are
28 to the pagination imposed by the Court’s e-filing system, CM/ECF.

1 386 U.S. 738 (1976), asking the California Court of Appeal to examine the record
2 independently. (Dkt. 22-2 [LD 2].) Petitioner filed a supplemental letter brief in
3 which he contended that both his trial and appellate counsel had conflicts of interest
4 and rendered ineffective assistance. (Dkt. 22-3 [LD 3]; see also Dkt. 22-4 [LD 4] at
5 3.) The California Court of Appeal issued a written opinion affirming Petitioner's
6 convictions on August 14, 2015. (Dkt. 22-4 [LD 4].) See also Yanez, 2015 Cal.
7 App. Unpub. LEXIS 5800. Petitioner did not file a petition for review in the
8 California Supreme Court. (Petition at 3 ¶ 4; Dkt. 22-5 [LD 5].)

9 On December 6, 2016,² Petitioner filed a petition for writ of habeas corpus in
10 the California Supreme Court. (Dkt. 22-6 [LD 6].) While that petition was pending,
11 Petitioner filed the instant federal Petition raising the same claims.

12 On January 6, 2017, Petitioner moved for a stay of his federal Petition while
13 he exhausted the claims in state court. (Dkt. 5.) Before the motion was fully briefed,
14 the California Supreme Court denied the exhaustion petition on February 1, 2017.
15 (Dkt. 10.) This Court denied the stay motion as moot. (Dkt. 11.)

16 Respondent then moved to dismiss the Petition as untimely. (Dkt. 21.) The
17 instant federal Petition raises two claims: (1) ineffective assistance of trial counsel,
18 and (2) ineffective assistance of appellate counsel. (Petition at 5.)

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23 ² This is the date Petitioner constructively filed the petition in the state court,
24 i.e., the day he signed it. (Dkt. 22-6 at 55 [LD 6].) Respondent argues that Petitioner
25 is not entitled to application of this "mailbox rule" because both his state petition and
26 the instant federal Petition are untimely. (Dkt. 21 at 3-4 n.2.) Regardless of which
27 date the Court uses—when the petition was signed on December 6 or when it was
28 received by the appellate court on December 8—the petition was filed after the
AEDPA statute of limitations had expired, as discussed below. In an abundance of
caution, the Court gives Petitioner the benefit of the mailbox rule.

III. DISCUSSION

A. The Petition is Untimely Absent Tolling or an Alternative Trigger Date.

1. The AEDPA Statute of Limitations

This action is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Lindh v. Murphy, 521 U.S. 320, 336 (1997). AEDPA provides as follows:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review:

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

1 28 U.S.C. § 2244(d).

2 Thus, AEDPA “establishes a 1-year time limitation for a state prisoner to file
3 a federal habeas corpus petition.” Jimenez v. Quarterman, 555 U.S. 113, 114 (2009).
4 The statute of limitations period generally runs from “the date on which the judgment
5 became final by the conclusion of direct review or the expiration of the time for
6 seeking such review.” 28 U.S.C. § 2244(d)(1)(A). “[F]or a state prisoner who does
7 not seek review in a State’s highest court, the judgment becomes ‘final’ for purposes
8 of § 2244(d)(1)(a) on the date that the time for seeking such review expires.”
9 Gonzalez v. Thaler, 565 U.S. 134, 135 (2012).

10 **2. Analysis**

11 Petitioner did not seek review of his conviction in the California Supreme
12 Court on direct appeal. His state court conviction therefore became final, for
13 purposes of the AEDPA statute of limitations, when the time for seeking such review
14 expired. Gonzalez, 565 U.S. at 135. An appellant has 40 days after the California
15 Court of Appeal issues its opinion to seek review in the California Supreme Court.
16 See Cal. R. Ct. 8.500(e), 8.264(b)(1); see, e.g., Smith v. Duncan, 297 F.3d 809, 812-
17 13 (9th Cir. 2002), overruled on other grounds by Pace v. DiGuglielmo, 544 U.S. 408,
18 418 (2005); Wixom v. Washington, 264 F.3d 894, 898 (9th Cir. 2001).

19 The California Court of Appeal issued its opinion affirming Petitioner’s
20 convictions on August 14, 2015. (Dkt. 22-4 [LD 4].) Petitioner’s conviction became
21 final 40 days later, on September 23, 2015. The AEDPA statute of limitations
22 therefore expired on September 23, 2016. Petitioner did not constructively file the
23 instant federal Petition until December 28, 2016, 96 days later.³ (Petition at 8.)

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26 ³ See note 3 above for discussion of the mailbox rule. The Petition was
27 received by the Court on December 30, 2016. (Dkt. 1.) Regardless of which date
28 the Court uses—the date the Petition was signed on December 28 or the date it was
received by the Court on December 30—the Petition is untimely.

1 **B. Petitioner is Not Entitled to Statutory Tolling for the Habeas Petition He**
2 **Filed in the California Supreme Court in December 2016.**

3 **1. Statutory Tolling**

4 AEDPA provides for statutory tolling as follows:

5 The time during which a properly filed application for State post-
6 conviction or other collateral review with respect to the pertinent
7 judgment or claim is pending shall not be counted toward any period of
8 limitation under this subsection.

9 28 U.S.C. § 2244(d)(2). The United States Supreme Court has interpreted this
10 language to mean that AEDPA's statute of limitations is tolled from the time the first
11 state habeas petition is filed until the California Supreme Court rejects a petitioner's
12 final collateral challenge, so long as the petitioner has not unreasonably delayed
13 during the gaps between sequential filings. Carey v. Saffold, 536 U.S. 214, 219-21
14 (2002); Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.), cert. denied, 529 U.S. 1104
15 (2000). However, statutory tolling "does not permit the reinitiation of a limitations
16 period that has ended before the state petition was filed," even if the state petition
17 was timely filed. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert. denied,
18 540 U.S. 924 (2003); see also Larsen v. Soto, 742 F.3d 1083, 1088 (9th Cir. 2013).

19 **2. Analysis**

20 Here, Petitioner did not file any state habeas petitions until December 2016.
21 At that point, the AEDPA statute of limitations had already expired in September
22 2016, one year after his conviction became final. The filing of his state habeas
23 petition does not revive or reinitiate the limitations period. See Ferguson, 321 F.3d
24 at 823. Thus, the Petition is untimely unless Petitioner is entitled to rely an alternative
25 trigger date for the statute of limitations or obtain equitable tolling.

1 **C. Petitioner Cannot Rely on the Alternative Trigger Date for Newly**
2 **Discovery Evidence.**

3 **1. Alternative Trigger Date for AEDPA Statute of Limitations in**
4 **Cases Involving Newly Discovered Evidence**

5 Petitioner argues that he is entitled to the alternative trigger date in
6 § 2244(d)(1)(D), which provides that the AEDPA statute of limitation begins to run
7 on “the date on which the factual predicate of the claim or claims presented could
8 have been discovered through the exercise of due diligence,” provided this date is
9 later than the date that the petitioner’s conviction became final.

10 “The statute of limitations begins to run under § 2244(d)(1)(D) when the
11 factual predicate of a claim ‘*could have been* discovered through the exercise of due
12 diligence,’ not when it *actually* was discovered.” Ford v. Gonzalez, 683 F.3d 1230,
13 1235 (9th Cir. 2012) (emphasis added); see also Juniors v. Dexter, No. 07-1377-
14 DMG (AGR), 2011 U.S. Dist. LEXIS 38111 at *6 n.3, 2011 WL 1334422 at *2 n.3
15 (C.D. Cal. Jan. 14, 2011) (“[T]he statute starts running on the date when the petitioner
16 knew or with the exercise of due diligence could have discovered the factual
17 predicate of his claim, not from the date on which the petitioner obtains evidence to
18 support his claim.”). The statute also begins to run “regardless of when [the facts’]
19 legal significance is actually discovered.” Ford, 683 F.3d at 1235. “Time begins
20 when the prisoner knows (or through diligence could discover) the important facts,
21 not when the prisoner recognizes their legal significance.” Hasan v. Galaza, 254 F.3d
22 1150, 1154 n.3 (9th Cir. 2001).

23 By its terms, § 2244(d)(1)(D) applies only where the “factual predicate” of the
24 claim could not have been discovered before Petitioner’s conviction became final.
25 “The question is when petitioner had the *essential facts* underlying his claim, not
26 when he obtained *additional* evidence supporting his claim.” Coley v. Ducart, No.
27 16-1168, 2017 U.S. Dist. LEXIS 25643 at *9, 2017 WL 714304, at *4 (E.D. Cal.
28 Feb. 23, 2017) (emphasis added). “[I]f material does not ‘change the character’ of a

1 claim or provide new grounds for a petition, it is not a ‘factual predicate’ within the
2 meaning of” § 2244(d)(1)(D). Id. (citing McAleese v. Brennan, 483 F.3d 206, 213-
3 14 (3d Cir. 2007)); see also Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012),
4 cert. denied, 133 S. Ct. 769 (2012) (holding § 2244(d)(1)(A) applies “only if *vital*
5 *facts* could not have been known by the date the appellate process ended”) (emphasis
6 added).

7 “Although the statute of limitations is an affirmative defense, courts
8 addressing the relative burdens under § 2244(d)(1)(D) have concluded that petitioner
9 bears the burden of persuading the court that he exercised due diligence in
10 discovering the factual predicate of his habeas claim.” Thompson v. Hill, No. 03-
11 255, 2004 U.S. Dist. LEXIS 22664 at *5, 2004 WL 2473307 at *2 (D. Or. Nov. 3,
12 2004) (collecting cases from other jurisdictions); see also Cooper v. Montgomery,
13 No. 15-8683-JFW (SS), 2016 U.S. Dist. LEXIS 140018 at *7, 2016 WL 5899292 at
14 *3 (C.D. Cal. Sept. 6, 2016); see, e.g., Majoy v. Roe, 296 F.3d 770, 776 n.3 (9th Cir.
15 2002) (finding petitioner did “not make an adequate showing of due diligence as
16 required by § 2244(d)(1)(D) to invoke this tolling provision”). “Due diligence does
17 not require ‘the maximum feasible diligence,’ but it does require reasonable diligence
18 in the circumstances.” Ford, 683 F.3d at 1235 (quoting Schleuter v. Varner, 384 F.3d
19 69, 74 (3d Cir. 2004)).

20 **2. Analysis**

21 Respondent argues that Petitioner is not entitled to application of the
22 alternative trigger date in § 2244(d)(1)(D) because Petitioner raised the same
23 ineffective assistance of counsel (“IAC”) claims in the April 2015 letter brief he filed
24 in the California Court of Appeal. (Dkt. 22-3 [LD 3].) Respondent argues that
25 Petitioner’s letter brief demonstrates that “the ‘vital facts’ of Petitioner’s claims—
26 counsel’s failure to perform a specific task, the existence of a potential witness, the
27 existence of the plea offer, etc.—were known to Petitioner while his direct appeal
28 was still pending[.]” (Dkt. 21 at 9.) The “new evidence” Petitioner later obtained

1 and now attaches to his Petition, Respondent argues, is simply “descriptions of pre-
2 trial and mid-trial events by Petitioner (which necessarily were already known to
3 Petitioner) or by Petitioner’s brother (which were known to Petitioner or could have
4 been discovered by simply asking his brother to describe his interactions with trial
5 counsel, as it appears [the brother] eventually did).” (Id. at 10.)

6 Petitioner admits that his letter brief to the California Court of Appeal “raised
7 (to a lesser degree) most of the ineffective assistance of counsel claims raised on
8 State Habeas and in this instant federal Habeas Corpus petition.” (Add. to Pet. at 10.)
9 He argues that the California Court of Appeal rejected the claims based on a lack of
10 factual support, and he therefore began an investigation to collect more evidence to
11 support those claims. (Id. at 10-12 [describing Petitioner’s investigation].) He
12 submits 353 pages of exhibits, which he claims constitutes “newly discovered”
13 evidence. (Dkt. 3, 3-1, 3-2.)

14 The Court has reviewed the claims raised in the current Petition, the pro se
15 letter brief Petitioner filed in the California Court of Appeal in April 2015, and the
16 evidence Petitioner has submitted with his current Petition. As explained claim-by-
17 claim below, the Court finds that Petitioner was already aware of the relevant facts,
18 or could have discovered them with the exercise of due diligence, within one year of
19 September 23, 2015, the date his conviction becoming final for AEDPA purposes.
20 Petitioner therefore is not entitled to rely on the alternative trigger date for newly
21 discovered evidence in § 2244(d)(1)(D).

22 a. IAC of Trial Counsel: Relying on Paralegal Rather than Hiring
23 Psychological Expert (Addendum to Pet. at 28-33)

24 Petitioner argues that his trial counsel, Matt Kohn, should have “retain[ed] the
25 assistance of an expert in child abuse and molestation cases, in order to discredit the
26 alleged victim’s allegations....” (Addendum to Pet. at 28.) Petitioner alleges that
27 Kohn advised Petitioner’s brother, Luis M. Yanez, against hiring an expert because
28 it “would cost \$10,000.00, and would only tell them ‘what they had already known

1 and/or wanted to believe.”” (Id. at 29 [brackets omitted].) Although “the Yanez
2 family informed [Kohn] from the outset of the case that funding was readily available
3 to retain such an expert if necessary,” Kohn instead advised hiring “a criminal law
4 paralegal” who “had herself been sexually abused by her step father” and therefore
5 could aid in evaluating the victim’s credibility. (Id. at 33, 29.)

6 Petitioner raised this same basic argument in his April 2015 letter brief to the
7 California Court of Appeal. (Dkt. 22-3 at 2-3 [LD 3, the letter brief].) Petitioner
8 contended that “counsel was ineffective in that he retained an underqualified
9 paralegal to evaluate [the victim’s] police interviews,” “based his trial strategy on
10 this nonexpert’s opinion,” and “failed to retain an FBI analyst or sheriff’s deputy as
11 an expert.” (Dkt. 22-4 at 3 [LD 4, opinion summarizing Petitioner’s claims].)

12 The new evidence Petitioner now cites in support of this claim is as follows.
13 First, emails between Petitioner’s brother, Luis M., and Kohn from July 2013. (Dkt.
14 3 at 143-45 [Ex. T at 45-47]; Dkt. 3-1 at 1-2, 19-21 [Ex. T at 48-49, 66, 67-68].)
15 These could have been obtained by Petitioner sooner, as they have been in his
16 brother’s possession and his brother has been actively helping with his defense and
17 appeal. Second, a September 2016 affidavit from the paralegal, as well as emails
18 indicating that Petitioner and his brother Luis M. had been trying to obtain this
19 affidavit since June 2016. (Dkt. 3 at 43-51, 56-63 [Ex. J, M, N].) The affidavit states
20 that when Kohn hired the paralegal, he “mentioned needing someone with ‘special
21 expertise’ in child molestation matters”; that the paralegal told Kohn she had “never
22 really worked on a criminal matter before”; and that she did not recall Kohn saying
23 he planned to use her as an “expert witness” or that her work would be the
24 “foundation of the defense.” (Dkt. 3 at 56-59 [Ex. M].) This affidavit further
25 supports Petitioner’s argument that it was IAC for Kohn to rely on the paralegal
26 alone, rather than hiring another expert witness. Together with Kohn’s emails, it also
27 indicates that Kohn may have misrepresented the paralegal’s qualifications to
28 Petitioner’s brother.

1 Nevertheless, Petitioner was aware of the essential facts underlying this IAC
2 claim in April 2015: that Kohn had chosen to hire a cheaper paralegal rather than a
3 more expensive psychological expert in support of Petitioner’s defense. This
4 additional evidence in support of Petitioner’s claim is not a new “factual predicate”
5 that would support the alternative trigger date in § 2244(d)(1)(D).

6 b. IAC of Trial Counsel: Extorting Money from Luis M. to Hire
7 Paralegal (Addendum to Pet. at 15-20)

8 Petitioner alleges that Kohn extorted money from Petitioner and his family
9 because Luis M. paid Kohn \$2,500 to cover the cost of hiring a paralegal, and in
10 reality Kohn only paid the paralegal between \$200 and \$250 for her work.
11 (Addendum to Pet. at 15-16.) Petitioner alleges that the “remaining balance left over
12 from the paralegal fees was not owed to Matt Kohn for any legal assistance that he
13 had provided, or that he would provide, in the case, and he had no legal claim to it.”
14 (*Id.*) Petitioner argues this “demonstrated disloyalty to Petitioner and his defense”
15 and created a conflict of interest. (*Id.* at 18-20.)

16 This was not alleged in Petitioner’s April 2015 letter brief. It appears that
17 Petitioner and his family did not learn how much Kohn had paid the paralegal until
18 June 2016, when the paralegal wrote an email to Luis M. estimating that Kohn had
19 paid her \$250 for her work on the case. (Dkt. 3 at 45 [Ex. J].) She later executed an
20 affidavit to this effect on September 18, 2016. (Id. at 58 [Ex. M].) Petitioner attaches
21 a February 2014 email from Kohn to Luis M. stating, “I obligated the paralegal to
22 spend prep time with me and already used the \$2,500 advanced for that purpose.”
23 (Dkt. 3-2 at 75 [Ex. T at 206].)

24 Assuming for the sake of argument that Kohn mishandled these paralegal fees
25 and that this could form the basis of an IAC claim, Petitioner learned of the
26 improprieties several months prior to when the AEDPA statute of limitations expired
27 on September 23, 2016. He also obtained an affidavit from the paralegal several days
28 before the statute of limitations expired. He has not explained why, with the exercise

of due diligence, he could not have timely filed a federal petition raising this claim.

c. IAC of Trial Counsel: Failing to Properly Communicate Plea Offer of 19 years (Addendum to Pet. at 21-28)

4 Petitioner says was made aware of this offer “[p]rior to the start of jury trial,
5 during a court hearing that Petitioner was present for.” (Addendum to Pet. at 22.)
6 Kohn advised Petitioner to reject the offer “without first explaining to Petitioner what
7 the terms and conditions of accepting that offer would be, or the amount of time that
8 Petitioner would be required to actually serve out (after being awarded credits) in
9 state prison.” (Id. at 22.) Petitioner alleges that if Kohn had properly advised him of
10 the “details and impact” of accepting the 19-year offer, he would have accepted it “in
11 order to save his family the humiliation of a public trial, to avoid being exposed to
12 the possibility of a life sentence, and to save his family the financial resources spent
13 on legal fees.” (Id. at 23.) After being found guilty at trial, Petitioner was given an
14 aggregate sentence of 21 years to life. (Dkt. 22-1 [LD 1] at 24-28.)

15 Petitioner alleges that he later learned, based on the “newly discovered”
16 evidence, Kohn “unilaterally decided that he would only allow Petitioner to accept a
17 plea deal that was 3 years or less.” (Addendum to Pet. at 22 [quotation marks and
18 brackets omitted].) This “new” evidence is a March 2016 affidavit from Petitioner’s
19 brother Luis M., stating that Kohn “indicated that he would ‘only’ allow [Petitioner]
20 to accept a plea deal that was 3 years or less,” even though the prosecutor “continue
21 to offer 19 years[.]” (Dkt. 3 at 18 [Ex. D].) Petitioner has also submitted an affidavit
22 indicating that he learned of Kohn’s 3-year position for the first time in March 2016,
23 “through reading [the] sworn affidavit from my younger brother....” (Dkt. 3 at 73
24 [Ex. P ¶ 9].)

25 In Petitioner's letter brief to the California Court of Appeal, Petitioner alleged
26 that, "Upon receiving [the paralegal's] report, Mr. Kohn decided that he would not
27 entertain any pleas from the prosecutor that did not meet his criteria." (Dkt. 22-3
28 [LD 3] at 4.) Thus, by April 2015, Petitioner was aware that Kohn allegedly decided

what an acceptable plea offer would contain, even if Petitioner was not aware that Kohn's criteria was 3 years or less of prison time. Moreover, Petitioner could have learned of this "3 year" decision earlier, because the information was in the possession of his brother Luis M., who has been actively involved in his defense and appeal. Additionally, Petitioner himself was aware of the alleged cursory nature of Kohn's consultation with Petitioner in connection with Petitioner's decision not to accept the 19-year plea offer. Even if Petitioner was not aware that this could constitute an IAC claim, the issue is "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan, 254 F.3d at 1154 n.3.

13 Petitioner alleges that he gave Kohn a list of witnesses who could have given
14 testimony lending “credibility to his claims of innocence, and to the position that he
15 had been ‘set up’ by his ex-girlfriend, her sister, and the alleged victim.” (Addendum
16 to Pet. at 33-34.) Petitioner alleges that Kohn did not contact any of these potential
17 witnesses, and he also failed to hire a private investigator, even though Petitioner’s
18 family “made funding available for that purpose.” (Id. at 33-35, 37.) Petitioner
19 contends, “The extent of Matt Kohn’s investigation … was his cursory review of the
20 client files and discovery materials....” (Id. at 37.)

21 Petitioner raised the same argument and allegations in his April 2015 letter
22 brief. (Dkt. 22-3 [LD 3] at 4, 12-13, 16-18.) The “new” evidence Petitioner now
23 submits is as follows: (1) a June 2016 affidavit from his father, Luis A. Yanez, stating
24 that Kohn was advised that the Yanez family was willing to pay to hire a private
25 investigator and any other related expenses (Dkt. 3 at 32 [Ex. G]); (2) a list of
26 potential witnesses and an affidavit from Petitioner stating that he gave this list to
27 Kohn at their first attorney-client meeting (*id.* at 64-68 [Ex. O], 74 [Ex. P ¶ 10]); and
28 (3) 2013 emails between Kohn and Petitioner’s brother Luis M. discussing these

1 witnesses (id. at 103-04, 107, 112-14, 131 [Ex. T]).

2 This “new” evidence merely memorializes events that either Petitioner or his
3 immediately family members were aware of from their personal knowledge since the
4 trial in 2013. Although having the events in writing, and in some cases in sworn
5 affidavits, corroborates Petitioner allegations, it does not provide a new factual
6 predicate for a new claim or claims. This evidence also could have been obtained
7 earlier with the exercise of due diligence, because Petitioner has been in frequent
8 contact with his family members, who have been actively aiding his defense.

9 e. IAC of Trial Counsel: Forcing Petitioner to Testify and
10 Inadequately Preparing Him to Testify (Addendum to Pet. at 39-
11 41)

12 Petitioner alleges that during an attorney-client meeting at the county jail
13 shortly before trial, Petitioner told Kohn did he not wish to testify in his own defense.
14 (Addendum to Pet. at 39.) Kohn responded that if Petitioner did not testify, Kohn
15 would “drop the case” and “stood up as if to leave the room at that very moment.”
16 (Id.) Petitioner alleges, “It was not until Petitioner told Matt Kohn that he would
17 testify, and asked him not to drop the case, that [Kohn] sat back down again and
18 resumed the meeting.” (Id. at 39-40.) Petitioner “felt that he had no other choice
19 [but to testify] in the matter in light of [Kohn’s] stated threat” because he did not
20 want to be left without an attorney for the “looming” jury trial. (Id. at 40-41.)
21 Petitioner also alleges Kohn inadequately prepared him to testify. (Id.)

22 Although these exact facts were not alleged in Petitioner’s April 2015 letter
23 brief, the brief did allege that Kohn told Petitioner he would lose if he did not testify
24 and “threatened to leave the case because … [he] was not absorbing [Kohn’s]
25 instructions quick enough.” (Dkt. 22-3 [LD 3] at 9, 12, 15.) In any case, the alleged
26 meeting between Kohn and Petitioner was within Petitioner’s personal knowledge,
27 and therefore is not “new” evidence. That Petitioner may not have appreciated the
28 potential legal significance of this interaction is not sufficient to trigger

³ § 2244(d)(1)(D). See Hasan, 254 F.3d at 1154 n.3.

Petitioner was also personally aware of how much time Kohn spent prepping Petitioner to testify in the case, meaning this is not “new” evidence. In the April 2015 letter brief, Petitioner similarly alleged that Kohn had not adequately prepared him to testify. (Dkt. 22-3 [LD 3] at 9-10, 16.)

f. IAC of Trial Counsel: Failing to Communicate with Petitioner
(Addendum to Pet. at 41-45)

Petitioner alleges that Kohn “failed to meet with Petitioner in order to establish a working ‘attorney-client’ relationship, and thereby, allow Petitioner to participate in his own defense” and “failed to personally keep the Petitioner updated on significant and meaningful developments in his case.” (Addendum to Pet. at 2, 13.) Petitioner alleges that Kohn chose to mainly communicate with Petitioner’s brother Luis M. and Petitioner’s father Luis A., and then Petitioner would learn what was happening in the case second hand from his father during weekend jail visits. (*Id.* at 21-22.) Petitioner alleges that Kohn visited him in prison only 3-4 times for no more than an hour each visit. (*Id.* at 34, 42-43 [giving dates of visits].)

The same argument and allegations were raised in Petitioner’s April 2015 letter brief. (Dkt. 22-3 [LD 3] at 3, 11-12.) The “new” evidence Petitioner submits is as follows: (1) an affidavit from Petitioner’s brother Luis M. opining that Kohn had violated the attorney-client agreement by failing to visit Petitioner at least 10 times in prison (Dkt. 3 at 19 [Ex. D at ¶¶ 9-12]); (2) an affidavit from Petitioner himself swearing to the relevant allegations (Dkt. 3 at 73 [Ex. P at ¶ 8]); (3) 2013 emails between Kohn and Luis M. discussing if and when Kohn would visit Petitioner in jail (Dkt. 3 at 128-29, 132 [Ex. T]; Dkt. 3-1 at 43, 65, 69-70 [Ex. T]). This evidence was either within Petitioner’s personal knowledge or the knowledge of his close family members. Petitioner could have uncovered this evidence within the normal AEDPA deadline with the exercise of due diligence.

g. IAC of Appellate Counsel (Addendum to Pet. at 46-49)

Ground 2 of the Petition alleges that Petitioner’s appellate counsel, Tracy J. Dressner, was ineffective because she failed to investigate Petitioner’s allegations that his trial counsel was ineffective and failed to file a state habeas petition alleging ineffective assistance of trial counsel. (Addendum to Pet. at 2, 46.) Petitioner argues that Dressner “could have easily obtained the evidence needed to raise the IAC claims with minimal investigate efforts,” and “[b]ecause Petitioner was able to discover new evidence in support of his IAC claims with relative ease,” Dressner “could have done the same.” (*Id.* at 46, 49.)

10 Petitioner was aware of the facts underlying this claim since at least April
11 2015, when he argued Dressner was ineffective in his letter brief to the California
12 Court of Appeal. (Dkt. 22-3 at 1 [LD 3, alleging Dressner should have filed IAC
13 claims against Kohn and that Dressner “made her final decisions without having
14 sufficient time to adequately review the contents of [Petitioner’s] case file”].)
15 Additionally, Petitioner’s allegation that he uncovered the facts underlying his other
16 claims with “ease” supports the Court’s conclusions that he could have discovered
17 all of the evidence he now submits within one year of when his conviction became
18 final, i.e., by September 2016. In sum, Petitioner is not entitled to rely on the
19 alternative trigger date in § 2244(d)(1)(D).

D. Petitioner is Not Entitled to Equitable Tolling.

1. Legal Standard for Equitable Tolling

22 In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held that
23 the AEDPA’s one-year limitation period is subject to equitable tolling in appropriate
24 cases. In order to be entitled to equitable tolling, a petitioner must show both that
25 (1) he has been pursuing his rights diligently, and (2) some extraordinary
26 circumstance stood in his way and prevented his timely filing. See Holland, 130 S.
27 Ct. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). “[T]he
28 threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the

1 exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.),
2 cert. denied, 537 U.S. 1003 (2002). Consequently, as the Ninth Circuit has
3 recognized, equitable tolling will be justified in few cases. Spitsyn v. Moore, 345
4 F.3d 796, 799 (9th Cir. 2003); Waldron-Ramsey, 556 F.3d at 1011 (“To apply the
5 doctrine in ‘extraordinary circumstances’ necessarily suggests the doctrine’s rarity,
6 and the requirement that extraordinary circumstances ‘stood in his way’ suggests that
7 an external force must cause the untimeliness, rather than, as we have said, merely
8 ‘oversight, miscalculation or negligence on [the petitioner’s] part, all of which would
9 preclude the application of equitable tolling.’”). The burden of demonstrating that
10 the AEDPA’s one-year limitation period was sufficiently tolled, whether statutorily
11 or equitably, rests with the petitioner. See, e.g., Pace, 544 U.S. at 418; Miranda, 292
12 F.3d at 1065.

13 **2. Analysis**

14 In his opposition to the motion to dismiss, Petitioner contends that he is entitled
15 to equitable tolling “for the period of time that he was engaged in ongoing pro se
16 investigations,” i.e., between March 1 and September 29, 2016. (Dkt. 32 at 11-12.)
17 Petitioner argues that “he was not able to bring his instant federal petition before the
18 Court until that investigative process was completed.” (Id. at 12.) In support of the
19 request for equitable tolling, Petitioner points to the following allegations in his
20 Petition:

21 Petitioner did not file a petition for review in the California Supreme Court
22 “[b]ecause appellate counsel, Tracy J. Dressner, refused to render any further
23 assistance following the Appellate Court’s denial of relief, and because Petitioner
24 lacked the legal education and/or understanding to represent himself.” (Addendum
25 to Pet. at 10.) After his convictions were affirmed by the California Court of Appeal
26 on August 14, 2015, Petitioner “began trying to educate himself on the laws and
27 procedures that govern the prosecution of State and federal Habeas actions.” (Id.) In
28 November 2015, Petitioner realized he needed help and “began to search for any

1 fellow prisoner (or prisoners) who might be able to render legal assistance to him.”
2 (Id. at 11.) Petitioner eventually met a fellow prisoner in the law library, Johnny Paul
3 Collins, who agreed to help Petitioner; Collins began reviewing Petitioner’s case file
4 in mid-February 2016. (Id.)

5 Between March 1 and September 29, 2016, Collins “began the pro se
6 investigation(s) into allegations that [trial counsel] Matt Kohn and [appellate
7 counsel] Tracy J. Dressner both rendered ineffective assistance of counsel in various
8 areas of their representations.” (Id. at 11-12.) During this investigation, Collins
9 obtained notarized affidavits from Petitioner, Petitioner’s brother Luis M.,
10 Petitioner’s father Luis A., and the paralegal hired by Petitioner’s trial counsel. (Id.)
11 Collins also obtained emails between Kohn and Luis M. (Id.)

12 These allegations are insufficient to support a finding that Petitioner is entitled
13 to equitable tolling. Although the Court appreciates the difficulties inherent in
14 attempting to do legal research and collect evidence while incarcerated, these
15 difficulties are not the type of “extraordinary” circumstance required for a finding of
16 equitable tolling. See, e.g., Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009)
17 (finding “ordinary prison limitations on Ramirez’s access to the law library and
18 copier” were not “extraordinary”).

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IV. **RECOMMENDATION**

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) granting Respondent's motion to dismiss (Dkt. 21); and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 29, 2017

Karen E. Scott
KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any Objections will be reviewed by the District Judge whose initials appear in the case docket number.

**Additional material
from this filing is
available in the
Clerk's Office.**